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No. 06-201

FILED
OCT 17 2006
OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE

Supreme Court of the United States

EL PASO TENNESSEE PIPELINE CO.,

Petitioner,

v.

GLADYS YOLTON *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION AND SUMMARY OF ARGUMENT

As shown in the petition, this Court should grant certiorari to resolve the deep-seated conflict among the circuits over the proper legal standard for determining whether collectively-bargained retiree health-care benefits are vested for life. As the *amicus* brief of the Chamber of Commerce, *et al.* reveals, this question is critically important to employers and employees throughout the nation, and the conflict among the circuits contravenes Congress's express policy favoring uniform interpretation of collective bargaining agreements.

Respondents urge this Court to deny the petition for two reasons: the appeal is interlocutory and the circuits are in accord. The first reason is true, but unpersuasive; the second is simply wrong. First, this case is a perfect exemplar of the type of case in which the Court grants interlocutory review. The petition presents a clear-cut legal issue that cannot be affected by factual development; the legal question is important; the judgment below subjects petitioner to immediate adverse consequences; and the Court's ruling will establish the framework under which the courts below must proceed. Second, respondents' failed attempt to explain away the evident circuit split vainly seeks to disguise critical distinctions in the cases and to characterize the courts' flatly conflicting interpretations of identical contractual language as meaningless. As numerous courts recognize, see *infra* at 5, the circuits are in irreconcilable, result-determinative conflict.

I. REVIEW IS FULLY WARRANTED HERE.

Respondents first argue that the petition should be denied because the appeal is interlocutory. Beyond labeling the decision "interlocutory," however, respondents fail to show that the issue presented does not warrant review under Supreme Court Rule 10. Nor do they identify any interest that would be served by delaying its adjudication. The reason for respondents' silence is evident: Each factor that this Court has traditionally found to support review when an order is interlocutory is present here.

As the preeminent treatise of Supreme Court practice has summarized,

> where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status—particularly if the lower court's decision is patently incorrect and the interlocutory decision, such as a preliminary injunction, will have immediate consequences for the petitioner.

Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 259 (8th ed. 2002). Similarly, "the interlocutory status of the case [is] no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." *Id.* at 260.

All of these factors are present here. First, the petition presents a clear-cut issue of law. Petitioner seeks review only of the *legal standard* that the Sixth Circuit applies in determining whether retiree health-care benefits are vested. No factual question still to be adjudicated has any bearing on this issue. In deciding the question presented, the only relevant "fact" will be the undisputed language of the collective bargaining agreements. In short, the question presented is a pure issue of law and is fully ripe for review.

Second, as demonstrated in the petition and brief of *amici curiae*, the question presented is recurring and exceedingly important.[1] Pet. 21-25, Brief of *Amici Curiae* 15-20. Given the escalating cost of health care, the shrinking ratio of active employees to retirees, and the impact of the global economy on U.S. companies, no issue of federal labor law is more important than the legal rules governing when retiree health-

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[1] Respondents argue that the petition "raises no issues of importance" because "all Circuits are in agreement on the traditional rules of contract construction." Opp. 20 (captialization omitted). As shown *infra*, respondents' claim that no circuit split exists is utterly without merit.

care benefits are vested for life. There is no reason to delay resolution of this important question. Cf. *Frisby* v. *Schultz*, 487 U.S. 474, 479 (1988) ("Because the question presented is of substantial importance, and because further proceedings below would not likely aid our consideration of it, we choose to avoid the finality issue simply by granting certiorari.").

Third, the judgment below has immediate, substantial consequences for petitioner. That decision requires petitioner to pay $1.8 million *per month* in retiree health-care benefits it contends it never agreed to pay. Cf. *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (reviewing an order directing the district court to enter a preliminary injunction in part based on its "immediate consequences" for petitioner). In addition, the judgment below imposes upon petitioner a substantial expenditure of funds and resources for a trial – a trial that will be wholly unnecessary if the Court grants the petition and adopts the legal standard petitioner advocates.

Fourth, resolution of the question presented may hasten or resolve the litigation, and will expedite the myriad other cases presenting this issue. If the Court agrees that retiree health-care benefits cannot be deemed vested in the absence of clear language in the collective bargaining agreement, its holding would resolve this litigation. In all events, the Court's opinion would provide fundamental, necessary guidance for the district court on remand (and all district courts addressing this issue in analogous settings) as to what language or extrinsic evidence should inform the vesting decision. Cf. *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 377 (1945) (engaging in interlocutory review where a ruling would be "fundamental to the further conduct of the case"); *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 153 (1964) (same).

Respondents offer nothing to rebut any of this, instead arguing that the case does not warrant review because it does not involve "fundamental constitutional rights." Opp. 7. But, this Court has never suggested that interlocutory review is reserved only, or even primarily, for cases presenting

constitutional questions. To the contrary, this Court has a long and unbroken practice of reviewing interlocutory appeals presenting important statutory and other nonconstitutional questions.[2] The considerations relevant to the decision whether to grant interlocutory review are those identified above. Here, all factors strongly counsel in favor of granting the petition and addressing the pure legal question presented.

II. THERE IS A CLEAR AND PERSISTENT CONFLICT AMONG THE CIRCUITS.

Respondents' other argument in opposition – that the circuits are "in substantial agreement" on the standard for determining whether collectively-bargained retiree health-

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[2] *See, e.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006) (reviewing affirmance of preliminary injunction); *Dep't of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125 (2002) (reviewing affirmance of preliminary injunction); *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999) (reviewing affirmance of denial of preliminary injunction and reversal of preliminary injunction); *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) (reviewing order directing entry of preliminary injunction); *Amoco Prod. Co.* v. *Vill. of Gambell*, 480 U.S. 531 (1987) (reviewing order directing entry of preliminary injunction); *Imperial County, Cal.* v. *Munoz*, 449 U.S. 54 (1980) (reviewing affirmance of preliminary injunction); *Sears Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) (reviewing reversal of preliminary injunction); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368 (1974) (reviewing vacatur of preliminary injunction); *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469 (1963) (reviewing affirmance of denial of preliminary injunction); *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957) (reviewing affirmance of preliminary injunction); *Leedom* v. *Int'l Union of Mine Workers*, 352 U.S. 145 (1956) (reviewing reversal of denial of preliminary injunction); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) (reviewing affirmance of preliminary injunctions); *Fed. Power Comm'n* v. *Panhandle E. Pipe Line Co.*, 337 U.S. 498 (1949) (reviewing affirmance of denial of preliminary injunction); *Graham* v. *Bhd. of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949) (reviewing reversal of preliminary injunction); *KVOS, Inc.* v. *Assoc. Press*, 299 U.S. 269 (1936) (reviewing order directing entry of preliminary injunction).

care benefits are vested – is wholly untenable. Several courts have specifically acknowledged the conflict among the circuits on this issue. See, *e.g.*, *Senior* v. *NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 216 (1st Cir. 2006); *Rossetto* v. *Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000); *Am. Fed'n of Grain Millers* v. *Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997). And none of respondents' attempts to paper over this long-standing and well-documented circuit split withstands even cursory scrutiny.

A. Circuits Disagree As To Whether Extrinsic Evidence Is Admissible To Prove The Parties' Intent When The Agreement Is Silent.

The crux of the circuit split described in the petition is whether extrinsic evidence is admissible to prove the parties' intent when the collective bargaining agreement contains no language regarding vesting. The Second, Third, and Seventh Circuits have clearly answered this question in the negative.[3] Other circuits have just as clearly answered it in the affirmative.[4]

Respondents' answer to this clear circuit split is that all courts have "recognized and applied the centuries-old rule

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[3] *See Joyce* v. *Curtiss-Wright Corp.*, 171 F.3d 130, 135 (2d Cir. 1999) ("We will not infer a binding obligation to vest benefits absent some language that itself reasonably supports that interpretation."); *Int'l Union, United Auto. Workers* v. *Skinner Engine Co.*, 188 F.3d 130, 147 (3d Cir. 1999) ("Silence on duration . . . may not be interpreted as an agreement by the company to vest retiree benefits in perpetuity."); *Rossetto*, 217 F.3d at 547 ("If a collective bargaining agreement is completely silent on the duration of health benefits, the entitlement to them expires with the agreement, as a matter of law . . . .").

[4] *See, e.g., United Paperworkers Int'l Union* v. *Champion Int'l Corp.*, 908 F.2d 1252, 1261 (5th Cir. 1990) ("The agreement itself does not speak to this issue . . . . Therefore, we remand for interpretation of the language of the agreement in light of extrinsic evidence of intent."); *Bower* v. *Bunker Hill Co.*, 725 F.2d 1221, 1223-24 (9th Cir. 1984) (considering extrinsic evidence where "the contractual language [did] not explicitly address the issue" of vesting).

that extrinsic evidence may be considered to resolve ambiguities in a written contract." Opp. 9. This argument misses the point. The question is not whether extrinsic evidence is admissible *to resolve an ambiguity* in the agreement; it is whether extrinsic evidence is admissible where an *unambiguous* agreement is completely *silent* as to vesting. In other words, the question is whether *silence* creates an ambiguity that opens the door for the admission of extrinsic evidence. The Second, Third, and Seventh Circuits correctly hold that it does not.[5]

To divert attention from this decisive distinction, respondents cite cases from the Third and Seventh Circuits that they mistakenly believe show that these circuits allow extrinsic evidence of the parties' intent where the agreement is silent. In so doing, respondents fail to grasp another crucial distinction – that between extrinsic evidence admitted to determine whether an agreement is ambiguous and extrinsic evidence admitted to prove the parties' intent. The Third and Seventh Circuits carefully observe this distinction, allowing extrinsic evidence to show that an agreement is ambiguous, but *disallowing* extrinsic evidence to prove the parties' intent where the agreement is silent.[6]

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[5] For this reason, the extrinsic evidence cited by respondents is legally irrelevant. In addition, the statements were not made by persons negotiating collective bargaining agreements and cannot be interpreted to modify or supersede contract language. *See, e.g., Musto* v. *Am. Gen. Corp.*, 861 F.2d 897, 908-10 (6th Cir. 1988) (citing cases).

[6] *See, e.g., Skinner Engine*, 188 F.3d at 145 ("[T]his court has instructed that extrinsic evidence may be used to determine whether a contract is ambiguous. Extrinsic evidence, however, may not be used to create an ambiguity where none exists.") (internal citations omitted) (emphasis omitted); *id.* at 147 ("Oral testimony certainly may be necessary when the terms of the written document are ambiguous. But when the language itself is not ambiguous, oral testimony may not be used to alter or add terms to a collective bargaining agreement which is otherwise complete."); *Rossetto*, 217 F.3d at 546 (discussing the difference between the limited "objective" evidence admissible to establish an ambiguity and the broader range of evidence admissible to

The cases cited by respondents thus do *not* show that the circuits agree that it is always appropriate to "examine extrinsic evidence to determine whether the parties to a CBA intended to establish vested benefits." Opp. 10. Respondents have identified nothing that casts any doubt on petitioner's showing that the circuits are badly split as to whether extrinsic evidence *of the parties' intent* is admissible where the agreement is silent as to vesting.

B. The Sixth Circuit Continues To Give Legal Effect To The Much-Disputed *Yard-Man* Inference.

Respondents next argue that the Sixth Circuit does not apply a presumption in favor of vesting. This argument is not responsive to anything in the petition, as petitioner did not argue that the Sixth Circuit employs a formal presumption that benefits are vested. Petitioner's position is, and always has been, that the Sixth Circuit's framework is incorrect, not because it presumes that benefits are vested, but because it allows retirees to prevail where, as here, the agreement contains *no language regarding vesting*.

Moreover, regardless of whether the *Yard-Man* inference can be labeled a "presumption," respondents have nowhere rebutted petitioner's claim that *Yard-Man* continues to cast a long shadow and to have legal effect on the outcome of cases in the Sixth Circuit. As detailed in the petition, and as the Sixth Circuit has explained, the *Yard-Man* inference eliminates the clear statement rule that the court would otherwise apply. Pet. 13-17. It also leads the Sixth Circuit to reach results that are consistently more favorable to retirees than those reached by the circuits that have rejected the *Yard-Man* inference in all of its guises. *Id.* at 15 n.5.

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prove the parties' intent if, but only if, an ambiguity is established); *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993) (en banc) ("[T]here must be either contractual language on which to hang the label of ambiguous or some yawning void . . . that cries out for an implied term. Extrinsic evidence should not be used to add terms to a contract that is plausibly complete without them.").

C. Circuits Give Flatly Inconsistent Interpretations To Identical Contractual Language.

Finally, respondents argue that the collateral "specific language" conflicts set out in the petition are not conflicts at all. Respondents' strategy is to muddy the waters by identifying differences in the factual contexts of the cases. In each case, however, the difference respondents identify is either *incorrect* as a matter of fact or *irrelevant* to the discrete interpretive question giving rise to the circuit split.

The "will continue" split. Respondents argue that courts have not given varying interpretations to language stating that employees' benefits "will continue" in retirement. This argument cannot be squared with the cases. For example, in *International Union, United Automobile Workers of America* v. *BVR Liquidating, Inc.*, 190 F.3d 768 (6th Cir. 1999), the Sixth Circuit interpreted an agreement stating that employees' health-care benefits would be "continued for themselves, their spouses, surviving spouses and eligible dependents" during retirement. *Id.* at 770 n.5. The court found that this language unambiguously demonstrated an intent to create lifetime benefits, asking rhetorically, "to what other date than the death of the retiree or the spouse could the word 'continue' apply?" *Id.* at 773. In *Skinner Engine*, the Third Circuit rejected identical reasoning, concluding that the phrase "will continue" "does not *unambiguously* indicate that the benefits will continue *ad infinitum*" because "[a]n equally reasonable interpretation is that the benefits 'will continue until the CBA expires.'" *Int'l Union, United Auto Workers* v. *Skinner Engine Co.*, 188 F.3d 130, 141 (3d Cir. 1999).

Respondents argue that the Sixth and Third Circuits' respective conclusions rested on the drafting history of the particular agreements at issue. This is simply not true. The *BVR* court's analysis of the contract's language never mentioned the drafting history; instead it rested largely on a previous Sixth Circuit case – *Helwig* v. *Kelsey-Hayes Co.*, 93 F.3d 243 (6th Cir. 1996) – in which the court had concluded

that similar "continuation" language demonstrated an intent to vest benefits. 190 F.3d at 773. Likewise, the *Skinner Engine* court's rejection of the plaintiffs' claim that the language unambiguously vested the benefits was based on a "plain reading" of the language and on the Second Circuit's similar conclusion in *Joyce*. 188 F.3d at 141-42. The court's discussion of the drafting history came only in response to plaintiffs' *alternative* argument that the language, even if not unambiguous, created an ambiguity precluding summary judgment. *Id.* at 142-43.

The "tying" split. Respondents argue that there is no conflict between the Sixth Circuit and the Second and Seventh Circuits as to the effect of language tying health-care benefits to pension benefits. Respondents first attempt to downplay the significance of such language in the Sixth Circuit, arguing that it is simply "one factor" the court considers. But, regardless of what other factors the court considers, it clearly accords "tying" language all but dispositive effect. See *McCoy* v. *Meridian Auto. Sys., Inc.*, 390 F.3d 417, 422 (6th Cir. 2004) ("Because the [agreement] ties eligibility for retirement-health benefits to eligibility for a pension . . . there is little room for debate that the retirees' health benefits vested . . . ."). Indeed, the "tying" language was the *only* language identified by either of the courts below that, in their view, addressed vesting.

Respondents next argue that the decisions of the Second and Seventh Circuits are irrelevant because each of the cases involved agreements with a reservation of rights clause. This is obfuscation. Neither court's conclusion that "tying" language is irrelevant to the question of vesting was remotely related to the reservation of rights clause. See *Joyce*, 171 F.3d at 134; *Vallone* v. *CNA Fin. Corp.*, 375 F.3d 623, 633 n.4 (7th Cir.), *cert. denied*, 543 U.S. 1021 (2004).

The "durational clause" split. Respondents deny any conflict between the decision below and the Eighth Circuit's conclusion that a clause that limits the duration of an

insurance agreement also limits the duration of the benefits provided thereunder. See *Anderson* v. *Alpha Portland Ind., Inc.*, 836 F.2d 1512, 1519 (8th Cir. 1988) ("It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date."). This argument, like the others, is blind to reality. As in *Anderson*, the agreement here contains an explicit clause limiting the duration of the insurance agreement. Thus, there is no escaping the conclusion that the Eighth Circuit would conclude that the decision below renders the durational clause at issue "nugatory." Respondents say that the cases are distinguishable because the agreement in *Anderson* had a clause providing that retiree benefits could be amended. Again, this is true but irrelevant. *Anderson*'s reading of the durational clause was entirely independent of the amendment clause. See *id.* (listing the amendment and durational clauses as the second and third of four independent reasons why the benefits were not vested).

In the end, it is absolutely clear that the circuits are splintered -- with respect to both the general framework governing retiree-benefit cases and the effect of specific language that frequently appears in collective bargaining agreements. Respondents' arguments to the contrary are based on wishful thinking and are demonstrably incorrect.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 17, 2006